

GVNW Consulting, Inc.  
Replies in ET Docket No. 04-295  
December 21, 2005

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Communications Assistance for Law	)	ET Docket No. 04-295
Enforcement Act and Broadband Access	)	
and Services	)	RM - 10865
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**REPLY COMMENTS OF GVNW CONSULTING, INC.**

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### **Executive Summary**

In its comment filing, the United States Department of Justice (DOJ) offered several compelling arguments from the perspective of the federal government. The result of these arguments, if accepted by the Commission, is to create a significant burden of proof for those proposing exemptions for certain classes of carriers. However, the real issue for rural carriers is less about a permanent exemption and more about providing a reasonable expectation of CALEA cost recovery.

The need of LEAs to be able to conduct effective surveillance is real. The ability of LEAs to conduct surveillance is dependent, at least in part, on accessing the infrastructure of carriers, including rural carriers. The needs of rural carriers to receive an opportunity to recover the costs related to providing this infrastructure is real.

Notwithstanding some of the opinions that have been placed in the record, rural carriers understand their responsibility as corporate citizens to

live with an appropriate balance between corporate fiscal needs and public safety and national security.

We propose the ability to qualify for an extension of time to comply rather than an indefinite exemption should be implemented for small carriers. Extensions of fixed duration with Commission/DOJ review will provide more certainty for small carriers in planning and implementing network upgrades required for compliance and provides the Commission with a formal review process that can balance public interest with the economic cost to small carriers. We also propose a total time for extensions and renewal of extensions based on the historical number of surveillances so that an extension program does not become a de facto indefinite exemption. A similar program has been used for several years for Circuit Mode CALEA compliance and has worked very well for small carriers. It has successfully achieved a fair balance between public safety and economic burden on small carriers and has resulted in timely implementation of CALEA compliance in rural communities in keeping with the limited demand for surveillance in these communities. In the few instances where surveillance has been requested of small carriers in the absence of CALEA compliance, small carriers have responded in a timely and efficient manner to law enforcement with alternative means to achieve requested surveillance.

This filing requests only that such a program as described above be implemented for small rural carriers who have experienced low demand for

intercepts and high cost of compliance. We do not presume to speak for other classes of carriers or other providers, where such a program might not be applicable. Such a program as described here will provide a fair balance of the public interest with the economic burden on small rural carriers.

## **INTRODUCTION AND BACKGROUND**

GVNW Consulting, Inc. (GVNW) is a management consulting firm that provides a wide variety of consulting services, including regulatory and advocacy support on issues such as universal service, access charge reform, and CALEA compliance for communications carriers in rural America. The purpose of these reply comments is to respond to the Further Notice of Proposed Rulemaking (FNPRM) released by the Commission in the above-captioned docket.

We have participated actively in prior rulemaking proceedings and applaud the Commission's current efforts to address the myriad of challenges that are pertinent to CALEA compliance issues.

## **AN UNDERSTANDABLY HIGH STANDARD HAS BEEN PROPOSED WITH RESPECT TO CARRIER CLASS EXEMPTIONS**

In its comment filing, the United States Department of Justice (DOJ) offered several compelling arguments from the perspective of the federal government. The result of these arguments, if accepted by the Commission, is to create a significant burden of proof for those proposing exemptions for certain classes of carriers.

In its filing, DOJ states at *iii* that “*indefinite exemptions should be the exception rather than the rule, and should be granted with the express understanding that such exemptions are neither permanent nor irreversible. Any exemption granted should be narrowly tailored to the circumstances involved and should last only as long as the facts and circumstances warrant.*”

Continuing this thought at page 12, DOJ further states that “*public safety and national security interests at stake are too important to fashion blanket exemptions without a sufficient factual predicate that will allow the Commission to determine the need for an exemption and its effects on important public safety and national security interests.*” (footnote omitted)

At page 21, DOJ addresses issues regarding the factual predicate with an opinion that “*a specific factual predicate for what is reasonably achievable or that otherwise affects the balance of equities can easily and often does change over time. Accordingly, DOJ opposes the grant of permanent exemptions.*”

In sum, the government has stated a strong case for its position. But, as we discuss below, the real issue for rural carriers is less about a permanent exemption and more about providing a reasonable expectation of CALEA cost recovery.

## **THE EVOLUTION OF THE PSTN IS A RELEVANT ISSUE IN THIS DOCKET**

The DOJ furthers its argument at page 8 by referencing that this Commission “*has acknowledged that the concept of the PSTN is one that can evolve over time* (footnote cited referencing the CALEA Broadband Order at paragraph 39).” The DOJ enhances its argument by offering the futuristic opinion that “*if a VoIP provider has no need to maintain any connection to the PSTN, as it is today understood, but its service continues to be a replacement for local telephone exchange service, that provider should be subject to the SRP. Under these circumstances, the PSTN should be deemed to have evolved. The Commission should clearly state in its ruling that interconnection to the PSTN as a standard is dependent upon the continued practice of interconnection, and should further clarify that the Commission will revisit this standard as the PSTN evolves.*”

Under either the current technology paradigm, or under that which is evolving, the threat to national security and public safety is real. The need of law enforcement agencies (LEAs) to be able to conduct effective surveillance



is real. The ability of LEAs to conduct surveillance is dependent, at least in part, on accessing the infrastructure of carriers, including rural carriers. The needs of rural carriers to receive an opportunity to recover the costs related to providing this infrastructure is real.

All entities that carry packet information should be required to comply with CALEA Packet Mode Requirements. Requiring only certain types of entities and not others to comply with CALEA would place different economic burdens on different entities. Given US policy and the FCC's commitment to provide competition for all services wherever economically sustainable, an unevenly applied requirement for compliance with CALEA on providers would be anti-competitive by providing some entities with an artificial, government imposed competitive advantage over their competitors that were required to implement CALEA

The following sections of these reply comments address these very real cost recovery issues. There is a real cost to providing public safety and national security. We respectfully request that the Commission focus its attention to providing for real recovery of real costs, not the failed past practice of allocating funds to switch vendors who failed to produce cost effective solutions for small carriers.

**THE TENSION THAT REQUIRES BALANCING FROM A PUBLIC POLICY PERSPECTIVE IS BETWEEN THE SURVEILLANCE NEEDS OF LAW ENFORCEMENT AGENCIES AND THE ABILITY OF RURAL CARRIERS TO ACCOMPLISH COST RECOVERY**

We respectfully submit that the issue of appropriate cost recovery has been clouded by requests for blanket exemption by some parties. Based on several filings in the initial round, the Commission is faced with conflicting assertions from a number of parties. Notwithstanding some of the opinions that have been placed in the record, rural carriers understand their responsibility as corporate citizens to live with an appropriate balance between corporate fiscal needs and public safety and national security.

Other parties, such as Jeff Pulver, further obfuscate the issue of cost recovery with inflammatory rhetoric. While Mr. Pulver is regarded by some as a brilliant business strategist, he demonstrates a fundamental lack of understanding of the balance needed in developing prudent public policy in the areas of public safety and national security. As stated in his November 1, 2005 Issue: The Return of the Pulver Report:

*Why not shut down the Internet? Why not shut down the PSTN? Why not prohibit anyone from leaving their homes? Why not lock up everyone? These mechanism[s] would certainly curb criminal activity?*

It is difficult to have a rational debate in the public forum when such extreme diatribes appear to be the approach favored by some advocates.

**REQUIRING DATE-CERTAIN COMPLIANCE WITH THE CALEA PACKET  
MODE REQUIREMENT IN THE ABSENCE OF COMMERCIALY  
AVAILABLE EQUIPMENT IS ECONOMICALLY BURDENSOME TO  
SMALL CARRIERS**

Requiring compliance with CALEA Packet Mode from small carriers immediately or on a date certain interval of 18 months would impose an unnecessary economic burden on small carriers. Unlike with Circuit Mode, where both an industry standard and compliant commercially available equipment existed very early in the deployment process, it is not certain when, or, given progress over the last several years, even if, a standard will exist for Packet Mode at the time of a date-certain requirement, or whether commercially available equipment will be available from vendors. Given the limited resources of small carriers, requiring a small carrier to comply with Packet Mode in the absence of commercially available compliant equipment is burdensome and absurd. If equipment vendors with the resources of Cisco or Tellabs cannot provide Packet Mode compliant equipment, requiring a small carrier with less than 100 broadband Internet customers to develop their own solution is extremely burdensome and patently unreasonable.

Small carriers replace and upgrade existing equipment as service requirements and sound business planning dictate. When current equipment is providing adequate service, date-certain requirement for deploying CALEA would require upgrade or replacement of network equipment solely to provide CALEA compliance. One of the provisions of the CALEA statute is that CALEA compliant equipment be deployed by carriers on an economically prudent basis consistent with ongoing business and technical planning. Imposition of compliance requirements on small carriers on a date certain

basis, especially in the absence of commercially available equipment to do so, is not in keeping with the CALEA statute and is economically burdensome. GVNW has provided cost for CALEA compliance with Circuit Mode in previous comments showing that there are very significant costs to deploy CALEA in many small, rural communities.

**A RATIONAL APPROACH TO PROVIDE FOR EXTENSIONS OF TIME TO COMPLY IS A PHASED IMPLEMENTATION APPROACH**

The FNPRM requests input on how proposals for extensions of time should be based. An extension of requirements for CALEA compliance, rather than an exemption, achieves a fair balance between public safety requirements and economic burden on small carriers

A reasonable short term renewable extension with FCC and/or DOJ review would provide a balance between national security/public safety and economic burdens on small carriers. Extension of fixed duration with Commission/DOJ review will provide both certainties for small carriers in planning and implementing network upgrades to achieve compliance and provide the Commission with a formal review process to balance the public interest with the cost of CALEA to small carriers.

Such a program has worked very well in the Circuit Mode area. Under this program, 49 GVNW clients were non-compliant as of June, 2002. At this time, only 13 clients remain non-compliant. Eight of the currently non-

compliant have upgrades underway or firm plans for 2006 that will provide for CALEA compliance by December 31, 2006. Most of the carriers that are not compliant serve very remote rural areas, and the great predominance of them serve the rural Alaska bush in very small (less than 300 access line) villages. As economically feasible upgrades are made, CALEA compliance will be deployed. The requirement that carriers file a request for waiver of compliance every two years has provided adequate emphasis for carriers to comply with the public interest benefits of CALEA. Commission and FBI review allows law enforcement to review each carrier's request on an individual basis, and make specific arrangements for compliance in circumstances where law enforcement and national security issues require it.

There have been very few requests for surveillance among the small carriers represented with respect to CALEA issues by GVNW's Western Region. During the 2000-2003 periods, out of 59 carriers and 199 central offices, there have been only 3 requests for surveillance by law enforcement. In each case, the carrier has responded to law enforcement's requirements in a timely and efficient manner. In those cases where CALEA compliance had not yet been achieved by the carrier, alternate arrangements were made to the satisfaction of both law enforcement and the carrier.

This phased implementation approach has achieved compliance in an economically efficient manner for Circuit Mode while balancing the economic

requirements of CALEA compliance by not imposing undue economic burdens on carriers.

A program as discussed above has not been used to assist with compliance with Packet Mode CALEA requirements due to the withdrawal of the Flexible Deployment extension program for Packet Mode compliance by the FBI. As with Circuit Mode, small carriers stand ready to deploy Packet Mode equipment when it becomes available from network equipment manufacturers on a cost-effective basis for small carriers. However, small carriers have neither the resources to develop a Packet Mode compliant solution internally nor the clout with large equipment manufacturers to influence the speed at which the manufacturers make available Packet Mode compliant equipment. However, given the success of such a program in the small carrier area, such a program would result in timely introduction of CALEA compliant equipment among small carriers once the other parties to the equation, equipment manufacturers, complete their portion of the compliance cycle by developing compliant equipment. This program should be implemented for Packet Mode compliance for small carriers with one major addition absent from the current Circuit Mode program. The commission should set a total time limit for compliance so that multiple requests for extension do not become a de facto indefinite exemption from CALEA requirements. Such a program should be based on historical number of surveillances to balance compliance requirements with demand for

surveillance. GVNW proposes the schedule below for a final deadline for carriers to become compliant with CALEA Packet Mode requirements.

<b>Average Annual Number of historical LEA intercepts for the period of 2003-2005</b>	<b>Total number of months available for carrier to achieve compliant status after a vendor provides a commercially available, cost effective solution for sale</b>
Zero (0)	Sixty (60) months
One – Three (1-3)	Thirty-six (36) months
Four – Six (4-6)	Twelve (12) months
Seven (7) or more	No extensions available

For carriers that have not had a single request for a LEA intercept for a three year period, it is reasonable to grant an additional 60 months to achieve compliance status.

In order for the program proposed here to achieve tangible, timely results, commercially available CALEA compliant equipment must be made available to carriers on an economically viable basis. One reason, indeed the predominant reason, that CALEA Circuit Mode compliance has not been implemented by small carriers on a much faster basis than has occurred is that vendors have not made CALEA upgrades backward compatible to existing equipment on an economical basis on Circuit Mode equipment. Despite large sums paid by the Department of Justice directly to some Circuit Mode equipment manufacturers, these manufacturers have tied CALEA

compliant functionality to costly major upgrades and replacements. This has significantly delayed CALEA deployment among small carriers. If the DOJ chooses to fund development of CALEA Packet Mode compliance with payments directly to equipment manufacturers, there should be very specific and enforceable rules regarding cost of compliant equipment to carriers that accompany these payments to vendors. The DOJ should strive to provide an incentive so that all CALEA upgrades are backward compatible to existing equipment so as to alleviate economic burdens on not only small carriers, but on all carriers and their customers.

GVNW only requests that the program proposed here be applied to small rural carriers where demand for intercepts is low and there is currently no commercially or technically feasible way for these small carriers to achieve compliance. Such a program effectively balances the public interest with the economic burden on small carriers in achieving compliance. GVNW leaves it to the discretion of the Commission as to whether the program proposed here is applicable to other classes of carriers.

Respectfully submitted

Via ECFS on 12/21/05

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